2000

Davis County, a body politic of the State of Utah v. Zions First National Bank, Trustee of the Max Kerr Trust Dated November 26, 1996, and Intervenors Tod B. Jones and Paul E. Barker : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVIS COUNTY, a body politic of the State of Utah, Plaintiff/Appellant, vs. ZIONS FIRST NATIONAL BANK, TRUSTEE OF THE MAX KERR TRUST DATED NOVEMBER 26, 1996, AND INTERVENERS TOD B. JONES AND PAUL E. BARKER, Defendant and Interveners/Appellees.	Court of Appeals No. 20000962-CA District Court No. 970700354CV (Priority No. 15)

REPLY BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH
HONORABLE THOMAS L. KAY DISTRICT JUDGE PRESIDING

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CERTIFICATE OF SERVICE

Pursuant to Utah Rule of Appellate Procedure 21 I hereby certify that I caused two true and correct copies of the within and foregoing REPLY BRIEF OF APPELLANT to be mailed, postage prepaid, this 1st day of October, 2001, to the following:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF POSITION AND STATEMENT IN REPLY

The Brief of Appellees' Jones and Barker/Kerr makes it absolutely clear that the trial court committed multiple and reversible error requiring a reversal of the trial court judgment and the ordering of a new trial on the issue of compensation payable for the condemnation taking.

As to the first issue, Jones and Barker/Kerr, through a shell game in which the claimed paramount interest in the condemned property was conveniently shifted back and forth to obtain maximum monied advantage between Kerr on the one hand, and Jones and Barker on the other, managed to talk the district court into doing something that had only occurred once in over 100 years of Utah jurisprudence - - to switch forward the statutory valuation date from that mandated by statute, Utah Code Ann. § 78-34-11, of September 3, 1997 to a date when the district court happened to sign an order of intervention on August 13, 1998. Appellees' purpose in switching the valuation date was to make that date more consistent with its alleged comparable sales, most of which reflected enhanced values from the larger public project for which the Kerr property had been condemned.

Typically in eminent domain cases, parties are added or substituted as a matter of course, without even a suggestion that the statutory valuation date of service of summons and complaint on the owner of record and in possession should be changed. The Friberg case is the only decision in the annuls of Utah case law in which the Supreme Court concluded that to apply the statutory valuation date under those specific facts, would violate the constitutional guarantee of Just Compensation of Article I, Sec. 22 of the Utah Constitution. But the prescription of Friberg is narrow and patently exceptional - -

continuance of the case for seven years at the request of UDOT during which time the property was frozen in a rapidly escalating market while UDOT determined whether it would ever build the freeway for which the Friberg property was condemned. The facts of this case do not come even within the shadow zones of Friberg. By switching the valuation date, the trial court vastly changed the playing field in determining the market value of the condemned property. The ruling, if upheld, would open up Pandora's box to manipulation, as in this case, of the value date by the condemnee landowner, and potentially as well, by the condemning body.

Secondly, Appellees' Brief is not able to escape the fact that three of the five allegedly comparable sales which its land expert, Cook, used as a basis for his evaluation of the condemned property reflected sale prices that were directly enhanced and increased by the larger public development project of Davis County, for which the Kerr property was condemned. The rulings of the trial judge allowing such sales in evidence to determine market value was in violation of the plain dictates of Redevelopment Agency of Salt Lake City v. Grutter. The error was highly prejudicial and, standing alone, justifies and entitles Davis County to a new trial.

Thirdly, the trial court, over the timely objection of Davis County, permitted the evidence and argument of Appellees to the jury that the condemnation verdict would be paid by a collateral source - - the private "for-profit" developer of the Farmington Preserve Project, PBA. Even the Appellees are at a loss to find judicial support for their evidence and, in fact, they all but expressly admit error. Their defense that Davis County did not timely object and in any event, the error was harmless, falls on stony ground. The trial

judge expressly denied Davis County's pre-trial motion in limine to exclude evidence that "Mr. Prows [PBA] is the ultimate source of funding to pay for the judgment." The County's objection clearly preserved the error under Utah precedent. The prejudice of the evidence and argument of Appellees' counsel is not only clear, it is presumed under Utah law. The jury verdict of $1,606,500 was the very highest dollar amount under Appellees' flawed evidence of market value.

On top of all this, the trial judge misapplied and miscalculated the prejudgment interest on the verdict awarding over $160,000 of excessive interest.

The aggregation of prejudicial error or the individual error on any one of the three central questions in the appeal require a reversal of the lower court judgment and order sending the case back for a new trial on the issue of compensation to be paid for the condemnation taking.

ARGUMENT

I. THE APPELLEES' BRIEF IS A VIRTUAL CONCESSION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SWITCHING THE DATE OF VALUATION IN EMINENT DOMAIN FROM THE STATUTORY DATE TO THE COINCIDENTAL DATE ON WHICH THE COURT HAPPENED TO SIGN AN ORDER PERMITTING JONES AND BARKER TO INTERVENE.

1. Jones and Barker Led The District Court Into Error By Manipulating The Valuation Date From September 3, 1997 to August 13, 1998, The Date Judge Kay Signed The Order Of Intervention.

What this Court now knows from the Brief of Appellee's is that Jones and Barker, as of the date of service of summons under Utah Code Ann. § 78-34-11, had an unconsummated, executory contract for which they had paid $1,000 for the purchase of the Kerr Property subject to several contingent events which never transpired. Two of

those conditions required that approvals be obtained from Davis County with respect to the development of the property and further approvals for use and development of the site were required from the Army Corps of Engineers.

Both of those contingencies were impossible to fulfill and Jones and Barker knew that as of the date of service of summons, September 3, 1997. (R. at 14-16, 1158.) Moreover, Jones and Barker further knew immediately after they signed the unconsummated agreement in May 1997 that the Kerr Property was going to be taken for the public project. (R. 1138, 1200, p. 81.) Jones and Barker never, at any time, either consummate their executory contract or took possession of any part of the condemned property. (R. at 1200 pp. 75, 78; 1201 p. 485; 1209 Ex. 73.)

Davis County did precisely what it was required to do, that is to say, it served its condemnation complaint on September 3, 1997 on Kerr's trustee, Zions Bank, the record owner and the owner in possession of the condemned property. It had no obligation to name as defendants individuals who had essentially an unexercised option to purchase the property.

Jones and Barker cannot escape in this appeal the unrelenting legislative mandate of § 78-34-11:

> For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected . . . . (Emphasis added).

Neither can the Appellees escape the governing law in Utah set forth in State Road Comm'n v. Valentine, 349 P.2d 321(Utah 1960). In that case, the lessee of property under

condemnation intervened and joined the action claiming damages for its unexpired term of the lease, which lease was entered into a month before the condemnation action. The Utah Supreme Court regarded the intervening lessee's interest as "non-compensable" because at the time of the hearing on the State's motion for immediate occupancy, the lessee had only an "executory contract":

> "At the time of hearing on motion for immediate occupancy, the instrument entitled a 'lease' was nothing more than an executory contract for a lease, as yet unenforceable as a lease, and hence, non-compensable." (Emphasis added).

Id. 322-23. In their Brief, Jones, Barker and Kerr attempt to distinguish Valentine on the basis that the State was not aware of the Valentine leasehold interest at the time the condemnation action was filed and summons served on the landowner. That argument simply will not wash, for the level of knowledge of the State in Valentine, in either being aware or unaware of the executory lease, was completely irrelevant to the Valentine Court, and indeed, was not at issue.

The record is clear that at no time prior to October 21, 1997, did Jones and Barker or Kerr, for that matter, inform Davis County or the court of the existence of their unrecorded, unconsummated, executory contract on the Kerr Property. (R. at 268, 277.) That was two and one-half months after the date of service of summons on Kerr, the property owner. It was not until April 17, 1998 that Jones and Barker even filed a motion to intervene, which motion was uncontested and happened to be signed by the district judge on August 13, 1998. (R. at 83-94, 113, 116-18.) That simple order of intervention had nothing to do with the court obtaining jurisdiction over the property. The latter had taken place by the service of summons on September 3, 1997.

The argument made by Jones and Barker for switching the valuation date to the date of the intervention order has already been rejected by the Utah Supreme Court under similar facts in the early decision of Brigham City v. Rich, 97 Pac. 220 (Utah 1908). There, Brigham City commenced condemnation proceedings against Rich, the acknowledged legal owner of the subject property and, upon motion, secured an order for immediate occupancy. Thereafter, Rich closed on a previous unrecorded sale of the subject property to a third party, who thereafter joined the action contending that the date of valuation should be switched from the date of service of summons upon Rich to "some date subsequent to the time it acquired its title." Id. 221-22. The trial court in Rich rejected the argument to move the valuation date and the Supreme Court affirmed the decision:

> "When this [immediate occupancy] order was made and Brigham City pursuant thereto went into possession . . ., the subject property was appropriated to a public use and nothing remained thereafter for the court to do save to fix the amount of compensation and to require its payment. . . Appellant not only claimed under Rich's rights, but it succeeded to them after the order of condemnation and occupancy had been made with full knowledge thereof. . . After the order of condemnation had been made by the court, no one could acquire any rights to the [subject property]. The most that appellant can be entitled to, as between it and Rich, would be the right to receive the condemnation money for the land." ([brackets added] emphasis added).

Id. at 225. The fact is that Jones and Barker, like the appellant in Brigham City v. Rich, had not acquired a contract interest in the Kerr Property as of the date of service of summons, September 3, 1997 or as of the date of the order of immediate occupancy on the Kerr Property, October 31, 1997. Indeed, Jones and Barker admitted at trial in March of 2000 that even as of that date, they had not yet closed on the sales contract. (R. At 1200 pp. 75, 78; 1201 p. 219; 1202 p. 485; 1209 Ex. 73.)

Jones and Barker contend that Davis County "manipulated" the condemnation proceeding by filing its complaint after learning of Jones and Barker's interest "to scare them off." (App. Br. at 10.) The only manipulation and gamesmanship in this case was that of Jones and Barker, along with Kerr. At the outset, the beneficial interest in the Kerr property was acknowledged by Appellees to be in the name of Kerr trustee and that the trustee had the only justiciable interest in the property for the purpose of determining the entitlement to condemn, just compensation and the order of immediate occupancy on October 21, 1997. (R. at 2, 26; 1194 p. 69.) When Jones and Barker sought to intervene six months later, in April 1998, the "beneficial interest" in the property was shifted to the moving intervenors so they could argue that Davis County's "failure" to name Jones and Barker as necessary parties in interest required the establishment of a valuation date later than the date of service of summons on Kerr, viz., September 3, 1997. (R. at 249, 254-55.) After persuading Judge Kay that the valuation date should be switched and moved forward to August 13, 1998, the beneficial interest in the property then shifted back, again, to Kerr for the trial of the case. It was Jones and Barker's position at trial that Max Kerr was the beneficial owner of the property and that Jones and Barker unconsummated, executory contract for $531,000 was completely inadmissable before the jury in determining the amount of compensation and damages. Not only did Jones and Barker's counsel object to the mere mention of the Jones and Barker unconsummated transaction, but they argued and introduced evidence that "on the date fixed for valuation . . ., Mr. Kerr was holding [the property]," "[Davis County] took away Mr. Kerr's ability to sell the property," and Mr. Kerr "couldn't close [on the contract to Jones and Barker] because of the condemnation." (R.

1200 pp. 75, 78; R. 1201 p. 219; R. 1202 p. 485; R. 1209 Ex. 73.) Such shell game is "manipulation" on a grand scale.

The intrigue and scheme of Jones and Barker to obtain a later valuation date than the statutory date fixed by the Legislature under Utah Code Ann. § 78-34-11 demonstrate the difficulties facing the court in an objective enforcement of the eminent domain statutes if Jones and Barker along with Kerr are permitted to succeed in their clever maneuver. Such cleverness should not prevail in this appeal.

2. The Utah Supreme Court Precedent In *Friberg* Has Nothing To Do With The Facts of This Case.

Jones and Barker/Kerr's brief argues that the switching of the trial date in this case was supported by the precedent of Utah State Road Comm. v. Friberg, 687 P.2d 821 (Utah 1984). Of the thousands of Utah eminent domain cases, Friberg is the only case in over 110 years of Utah jurisprudence where the valuation date has been moved, and then for a very precise and narrow reason.

In Friberg, there had been a seven-year continuance and hiatus, between 1972 and 1979, sought by the State Road Commission (now UDOT) so that UDOT could determine whether the I-215 freeway was, in fact, going to be built. During that period time, there had been a major increase in the value of the Friberg property caused by the general increase and inflationary factors in the market generally completely unassociated with increased market value caused by the construction of the I-215 project for which the Friberg land was condemned. The time lapse of seven years during which Friberg's property was frozen in the market was so extraordinary that the Supreme Court found under those unique facts that the statutory valuation date would deprive Fribergs of the Just Compensation

guarantees of Article I, Section 22 of the Utah Constitution, as well as Due Process of Law.

The showing made by Jones and Barker in an attempt to demonstrate that Davis County had delayed the condemnation proceedings between the statutory date of September 3, 1997 and seven months later, on March 8, 1998, when Jones and Barker moved to the date of their intervention is no demonstration at all and does not come up to the shoe tops of the facts and the basis of the Supreme Court holding in Friberg. Here, there was no showing of any of the proceedings or of a continuance being granted, or even sought, by Davis County. On top of that, there was no demonstration, whatsoever, that there had been a major increase in seven months in the market value of the Kerr Property caused by the general inflation in the economy and general market conditions. Rather, Jones and Barker had to rely upon allegedly comparable sales whose prices were largely dictated by enhanced values attributable to the very project for which the Kerr Property was condemned. Those facts are missing absolutely in Friberg.

But the error of switching from the statutory valuation date in this case is exacerbated by the fact that Friberg was confined to its narrow facts. The Friberg Court, itself, expressly recognized the fact that the ruling was the only decision in the entire body of Utah jurisprudence in which there has been a departure from the statutory date of service of summons. In doing so, the Court cited cases from 1905 to the date of the opinion. 687 P.2d at 828.

But, the key to Friberg was the judicial recognition of the stark reality of seven years passage of time in which a landowner's property was placed in limbo, under a continuance order requested by UDOT, while UDOT decided whether it was going to ultimately need

the Friberg property and proceed to construct the freeway. No such facts exist in the instant case, "in any degree comparable" to Friberg. Id. at 828.

Appellees' argument that the statutory valuation date under § 78-34-11 "would be unfair" has been consistently rejected in a number of cases by the Utah high Court. See, Appl. Br. at 17-18. The attempt to claim that Ogden L. & I. Ry. Co. v. Jones, 168 Pac. 548 (Utah 1917), and Oregon S. L. & U.N. Ry. Co. v. Mitchell, 17 Pac. 693 (Utah 1899), are somehow helpful to Appellees' flawed position only serves to underscore the fallacy of their position. Both decisions are inapposite because their were no summons served on the property owner in either case. In the instant case, summons was served on the only property owner, who was also in possession of the condemned property.

3. Judicial and Public Policy Strongly Favors a Uniform and Objective Date of Valuation to Preclude Misuse and Manipulation By Either Party in an Eminent Domain Case.

Principles of uniformity and objectivity are important factors in the valuation process in eminent domain. Utah Dept. of Transp. v. Walter M. Ogden and Sons, Inc., 805 P.2d 173, 175 (Utah 1990); State Road Comm. v. Prestwich, 452 P.2d 548 (Utah 1969). It is important to both condemnor and condemnee by not only providing an objective and reasonable date upon which both the trial judge and the parties can rely, but it also has the advantage of precluding the condemnor and condemnee from manipulating or exploiting the date of value to their own purposes. For example, if the property were condemned in a falling or depreciating market and additional parties were to be added subsequent to the original service of summons, the condemning agency would not be entitled, under existing law, to ask the trial court to switch the date of valuation so as to reduce the market value

of the condemned property in the falling market. By the same token, it would preclude the condemnee in a rising market from claiming that the valuation date should be switched so as to obtain a higher market value than was extant at the date of service of summons.

A valuation date that is permitted to vacillate from case to case, as advocated by Appellees, opens the door for determining the date of fair market value by tactical gamesmanship and cleverness. The rule of law rejects such a result. Buxton & Christopher Architects v. State of Utah, 29 P.3d 650, 656 (Utah 2001).

4. The Legal Error of the Trial Judge Was Highly Prejudicial to Davis County.

The error committed by the district court in switching the value date from September 3, 1997 to August 13, 1998 was highly prejudicial. It suddenly made sales of other property made after the valuation date far more comparable and relevant than they would have been otherwise. It made a difference of between $100,000-$200,000 under and depending upon the analysis of each of the expert witnesses. Couple that fact with the trial court's further erroneous ruling, admitting into evidence enhanced sales within the project for which the Jones and Barker/Kerr property was condemned, results in an increased value estimate of Cook's appraisal of $1,606,000.

The ruling of the trial judge switching the statutory date of value forward to the day which he happened to sign an order permitting intervention of Jones and Barker constituted prejudicial error, entitling Davis County to a new trial on the issues of just compensation using the statutory date of valuation, September 3, 1997.

II. APPELLEES' BRIEF LEAVES NO DOUBT THAT THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE ALLEGED COMPARABLE SALES OF PROPERTIES WHICH WERE ENHANCED IN VALUE BY THE LARGER PUBLIC PROJECT FOR WHICH THE SUBJECT PROPERTY WAS CONDEMNED.

1. The Rule of the Utah Supreme Court in *Grutter* was Violated.

The subject property, at the date of valuation under § 78-34-11, was largely comprised of swamp land with a high water table that placed the ground under water a good portion of the year. It had no commercial access rights, and it had no utility facilities available to it. (See Attachment 1). The property was condemned for flood control and wetland mitigation resulting from the larger development public project of Davis County to the north. (R. at 1-13.) Jones and Barker/Kerr acknowledged that the property lacked access to it for commercial development, but claimed that a proposed commercial road built through PBA property to the east could be considered in determining the highest and best use of the Kerr Property before the taking. (R. at 1201 pp. 240-41, 277.) Thus, it was contended that the property was prime commercial real estate. A substantial number of the allegedly comparable sales utilized by the Appellees' witness, Cook, reflected sales prices which were directly enhanced by the public project of Davis County as to which PBA had been given the contractual responsibility to develop. The effect of that development necessitated the condemnation acquisition of the Kerr Property. Such was not a point of dispute in the case; indeed, Kerr, Jones and Barker stipulated that the property could be condemned for flood control, which enabled the larger public development project to be realized. (R. at 237-39.)

In their Brief, Appellees have attempted to end-run the clear import of

Redevelopment Agency of Salt Lake City v. Grutter, 734 P.2d 434 (Utah 1986) which precludes enhancements in market value from the public project for which the subject property is a part thereof or affected thereby. Davis County's position has been consistent that while the property was condemned for flood control, it was inextricably linked to the larger public project which included the development of PBA properties immediately to the north. (R. 1201 pp. 353-57.) As a consequence, sales of those PBA parcels were not admissible in evidence because their consideration violates the anti-enhancement rule of Grutter.

While the Appellees admit that enhancements to the PBA tracts resulting from the condemnation acquisition are not admissible in the valuation of the Kerr Property, (Appl. Br. at 31-32), they nonetheless argue that the Kerr Property should be valued as commercial land, having commercial access with a commercial highest and best use because the property bordered upon abutting ground of PBA. The problem undermining the argument is that the ground was greatly enhanced in value by the Davis County public project. It is the clear holding of Grutter and of supporting precedent throughout the Country that in cases where a public project enhances the value of adjacent properties to the property actually condemned, the enhanced value of the adjacent properties may not be taken into consideration and is not admissible in determining the fair market value of the condemned premises. United States v. Miller, 317 U.S. 369, 377-78 (1943); Board of County Comm. of Eagle County v. Vale Assocs. Ltd., 468 P.2d 842, 847 (Colo. 1970); Latham Holding Co. v. State, 209 N.E.2d 542, 544 (N.Y. 1965).

If the law were other than that spelled out in Grutter and Miller, the landowner would

reap a "windfall" by reason of enhanced values of neighboring properties caused by the government project that necessitated the taking of its ground. The Appellees' argument, if adopted, would allow a condemnor to offer into evidence the reduced sales prices of neighboring properties which are affected by the public project for which the condemned property is taken. For example, if a government agency condemned property for a waste incinerator plant, the Appellees' argument herein would allow the government agency to offer into evidence, on the issue of fair market value, sales of nearby parcels which were devalued and depressed due to the anticipated waste plant. The rule against enhancement protects both the condemnor and condemnee and is the law of the case. Jones and Barker/Kerr cannot avoid it.

There is absolutely no evidence in the Record to support the Appellees' argument that the PBA development could have taken place without the condemnation of the Kerr property. Appellees' expert on land value, Cook, plainly testified that the condemnation of the Kerr, Jones and Barker property was an integral component that permitted the development of the PBA properties to the immediate north and that the property was "directly related to the [public] project." (R. at 1201, pp. 299-300, 313-14; R. at 1202, p. 456.)

2. Contrary to Appellees' Brief, There Expert, Cook, Could Not, In Law, Make a "Personal Adjustment" to Eliminate the Enhancement From the PBA Sales.

Appellees make a fundamental mistake in contending in their Brief that Cook made a "downward adjustment" in the sale price of the PBA sales to account for enhancement. The argument fails to recognize that the admissibility of the alleged comparable sale does

not depend on whether the particular appraiser "adjusted" the sale to account for the enhancement. That sort of rule would simply let the appraiser "manipulate" by a "subjective adjustment" whatever he decided. The rule of Grutter and Miller does not allow the appraiser to exercise his self-help in justifying the use of an enhanced value sale. Rather, the anti-enhancement rule precludes the admissibility of the sale, at all, just as a sale to a government agency under the threat of condemnation or bankruptcy sale are inadmissible. State Road Comm. v. Peterson, 366 P.2d 76 (Utah 1961); Redevelopment Agency of SLC v. Mitsui Investment, 522 P.2d 1370 (Utah 1974). Thus, the three PBA sales should not have been received in evidence before the jury, as a matter of law, regardless of the appraiser's subjective judgment.

In point of fact, however, Cook did not make a subjective, downward adjustment in the Kerr Property because of the enhanced value of the PBA sales as a result of the project for which the Kerr Property was condemned. He stated emphatically that even though the PBA sales were enhanced in value as a result of the condemnation of the Kerr Property, "[t]hose are influences we can't take into account." (R. 1201 p. 254.) Cook made other subjective "adjustments" to the PBA sales, but not for enhancement in the market value of the comparable sales caused by the project. "That's totally inappropriate" testified Cook. (R. 1201 at 254.)

3. The Error of the Trial Court Was Prejudicial.

Three of Cook's five allegedly comparable sales involved PBA parcels inside the larger public project that sold at an average price per acre of $170,807. The two non-PBA parcels utilized by Cook sold at an average price per acre of $102,450. Thus, the average

price per acre reflected an increase of over 66%. It is thus clear that the error in admitting such sales was highly prejudicial.

To sustain their position, Appellees are forced to rely upon a statement from State Road Comm. v. Woolley, 390 P.2d 860 (Utah 1964), in which the Supreme Court held that in determining market value, "the jury may consider 'all factors bearing upon such value that any prudent purchaser would take into account . . ., including any potential development in the area reasonably to be expected.'" The trouble with that argument is that the quoted language was specifically repudiated in Grutter, where it was characterized as the "enhancement language" from Weber Basin Water Conservancy Dist. v. Ward, 347 P.2d 862 (Utah 1959). Ward was expressly overturned in the Grutter decision. 734 P.2d at 436-37.

The trial judge committed prejudicial error in permitting the PBA sales into evidence. Objections were made and reserved by Davis County. The error plainly requires a new trial.

III. THE ARGUMENT OF APPELLEES THAT PAYMENT BY PBA OF THE CONDEMNATION AWARD WAS RELEVANT IN DETERMINING MARKET VALUE IS MADE IN THE FACE OF PLAIN UTAH PRECEDENT TO THE CONTRARY AND REQUIRES THAT THE TRIAL COURT JUDGMENT BE REVERSED AND A NEW TRIAL ORDERED.

1. Irrelevant Evidence That PBA is the Source of Payment of the Jury Award of Just Compensation was Erroneously Admitted by the Lower Court.

Appellees simultaneously march in opposite directions on the question of whether evidence was admitted before the jury on the collateral source of payment by PBA of the condemnation award. On the one hand, they argue at page 41 of their Brief:

> "Davis County has not cited any trial testimony to the effect that Prows was going to pay the condemnation award. . . . All it has cited is statements of counsel, which are not evidence and were not objected to."

Appl. Br. at 41. However, in its Statement of the Case at p. 11, Appellees state to this Court that evidence of PBA's agreement to pay the condemnation award was admitted before the jury:

> "Later, evidence that the developer had agreed to pay for the condemnation was admitted without objection. (R. 1200 p. 39.)"

The fact is clear that Jones and Barker/Kerr presented evidence as well as argument of counsel that PBA would pay the jury verdict. (R. 1004, 1200 pp. 17, 39; R. 1201 p. 379; R. 1202 pp. 459-60, 482, 517.) There is no question but that the attention of the jury was diverted from the objective standard of market value to the collateral and totally irrelevant issue as to who was going to pay and satisfy the jury verdict. Utah case precedent has consistently rejected such evidence and argument of counsel as inflammatory and prejudicial.

In Hill v. Cloward, 377 P.2d 186 (Utah 1962), it was argued that where the defendant has no insurance the jury should be informed because insurance coverage would be assumed by jurors and its absence should be disclosed to counteract any inclination to be generous with non-existent insurance money. The Supreme Court clearly rejected that argument and ordered a new trial because of the immateriality and prejudice of such evidence and argument:

> "It seems hardly necessary to state that the matter of insurance is quite immaterial to issues as to liability and damages, or the amount thereof. It is also true that inasmuch as the defendant is entitled to have this extraneous matter excluded from the case, the plaintiff is entitled to the same protection if he so desires. If the defendant were allowed to show noninsurance and

> the plaintiff allowed to rebut it, the mischief which could develop from preoccupation with the immaterial issue is obvious."

Id. at 187 (emphasis added). The authorities cited in Davis County's Opening Brief are unassailed by Appellees. (Applts. Br., Point III, p. 41-43.) In a statement that flies in the face of Hill, Jones and Barker/Kerr make the rejected argument that "Utah law favors informed juries" on source of payment because "jurors naturally assume that condemnation awards come from taxpayer dollars." (Appl. Br. at 45.)

The receipt of evidence and argument of counsel that PBA, a private corporation, was benefitting from the condemnation acquisition and was going to pay the condemnation award was reversible error.

2. Davis County Preserved Its Objection When The Trial Court Denied Its Motion in Limine To Exclude Evidence of the Source of Payment.

It is clear in this case that Davis County, in advance of trial, filed a motion in limine to exclude evidence at trial relative to the collateral source of payment by PBA of the jury verdict on compensation and damages for the condemnation taking. At the hearing on the motion in limine, Judge Kay stated that he was not going to exclude evidence that PBA had nothing to do with the condemnation acquisition. (R. at 1199 pp. 60-61.) Judge Kay then stated expressly on the record:

> "[Davis County's motion to exclude evidence] of developer being involved is going to be denied and it can be brought up during the trial . . . ."

(R. 1199 p. 61.) (emphasis added.). Thus, there is no doubt that Davis County's motion in limine was denied outright. The statement that the issue "can be brought up during the trial" in no way modified the denial, but rather was a statement to counsel for Jones and Barker/Kerr that it could be brought up during the trial.

But the matter does not stop there. Most importantly, Judge Kay thereafter signed an order prepared by Appellees which absolutely denied outright the motion in limine:

> "Plaintiff's motion to exclude evidence that Mr. Prows is the ultimate source of funding to pay for the judgment in this matter is denied."

(R. 599.) (emphasis added.). That unambiguous language of the trial court's order is dispositive of the issue. As the Supreme Court stated in Evans v. State of Utah, 963 P.2d 177, 180 (Utah 1998):

> "Regardless of the language used during the hearing, the language in the court's final written order controls."

Id. 180. The order of Judge Kay is unequivocal and unambiguous that Davis County's motion in limine to keep the collateral source of payment out of evidence was denied. Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978) (Appellees argument that "denial" of a motion in limine is ambiguous has been squarely rejected by this Court and the Supreme Court); Salt Lake City v. Holtman, 806 P.2d 235 (Utah Ct. App. 1991); State of Utah v. Mitchell, 779 P.2d 116, 119 n.4 (Utah 1989).

When a motion in limine has been denied, it is unnecessary to make a further objection at trial in order to preserve the objection on appeal. State of Utah v. Griffin, 754 P.2d 965, 967 (Utah Ct. App. 1988); Salt Lake City v. Holtman, supra.

Judge Kay made a fundamental error in denying Davis County's motion in limine. After Judge Kay signed the order, expressly denying the motion, Jones and Barker/Kerr argued the issue to and presented evidence before the jury on this completely irrelevant question, with the clear intent of creating bias and prejudice against the Plaintiff, Davis County, and sympathy for Jones and Barker/Kerr. They cannot be permitted to get away

with such significant error by claiming that having lost the motion in limine on the issue, Davis County should have continued to object at trial and failing to do so, invited the error.

3. Davis County Did Not Invite Error.

Appellees contend that Davis County "opened the door" to the evidence and argument that Prows [PBA] was the source of payment of the condemnation award. (Appl. Br. 43.) Such claim is premised upon a simple comment by the Deputy Davis County Attorney in opening statement in which it was said that Davis County was a prudent manager of the County's tax money. (R. 1200 p. 17.) That and that, alone, was all that was said by Davis County on the subject because counsel for Appellees made the irrelevant objection before the jury that "I've got to object on argument on a prudent manager. They are not paying for this property, the developer is . . . ." (R. 1200 p. 17.)

The obvious fact is that Davis County made no reference directly, or indirectly, to the condemnation acquisition costs or the source of payment; rather, at the most, County counsel started to speak about the larger Farmington Preserve Project when Appellees' counsel cut him off. That is not a statement upon which Appellees can palm-off the prejudicial error of both evidence and argument as to the source of payment of the jury verdict. Okon v. State of Texas, 391 S.W.2d 486, 489 (Tex. Ct. App. 1965) (finding the state's argument that "[t]he State has a duty to you to see that public monies are expended in a proper fashion," not to be an improper appeal to the jurors' self-interest as taxpayers). The cases cited by Appellees in their Brief are factually inapposite.

4. The Error of the Trial Court in Permitting Evidence of the Collateral Source of Payment By PBA Was Highly Prejudicial.

The Appellees' Brief plainly recognizes the error that was committed, for they wind

up the argument in their Brief by the heading that "Any Error Was Not Prejudicial." Their acknowledgment of error, while candid, could hardly be anything else in light of the evidence submitted by Jones and Barker/Kerr to the jury and the closing argument of their counsel in which he pointedly stated:

> "And I want to ask you, what gives the government the right . . . to take something from Max Kerr and give it to someone else? What gives the government the right in a for-profit company to take Max Kerr's zoning and everything he had and give it to Mr. Prows, to give it to a for-profit corporation?"

(R. 1202, p. 481.) The obvious target of counsel's argument was the developer, PBA. The question that must be asked in this appeal is - - - how could that sort of prejudicial argument have anything to do with the issue of fair market value, an objective standard involving the willing and able buyer and seller in the market? The argument of Appellees' counsel might have been made at a far earlier point in the case if Kerr had contested the entitlement to condemn. But Jones and Barker/Kerr stipulated to the right of Davis County to condemn the Kerr Property, leaving the only question before the court to be tried by jury the traditional issue of fair market value. (R. at 237-239.) There can be no doubt that counsel's argument was specifically intended to prejudice and bias the jury against PBA and to incur sympathy for Max Kerr.

The prejudice from this evidence and argument is implicit and overwhelming. As stated by the Alabama Court of Appeals in Nicrosi v. City of Montgomery, 406 So.2d 951 (Ala. Ct. App. 1981):

> "That the expenses incident to condemnation and the award itself are to be paid by private parties is immaterial when the property thus being acquired . . . is to be used for a public benefit, and . . . it [is] highly prejudicial for members of the jury to be informed that someone other than the condemning

party would have to pay the verdict."

Id. at 952-53 (emphasis added). The jury verdict reflects the prejudice and bias of the inflammatory and prejudicial evidence, coming in squarely on the Cook appraisal of $1,606,500. That amount was $1,075,500 higher than Jones and Barker had agreed to pay under their unconsummated, executory contract entered into on May 1997, barely three months before the date of service of summons in this case. (R. at 87, 908.)

The error of the trial court is manifest and the prejudice is obvious. A new trial on the issue of damages and compensation is required.

IV. CONTRARY TO APPELLEES' FATUOUS ARGUMENT, THE TRIAL COURT ABSOLUTELY COMMITTED ERROR IN CALCULATING PREJUDGMENT INTEREST.

The argument of Appellees with regard to the date from which prejudgment interest is to be determined is punctuated with factual inconsistency and contradiction and by the absence of legal analysis.

To begin with, there is no question that the prejudgment interest, to which a landowner is entitled in eminent domain, stems from the controlling statute, Utah Code Ann. § 78-34-9. (8% per annum from either the date of the order of occupancy or the date of actual possession by the government, whichever is earlier). Davis County did not take possession of the property until after April 1999. The Order of Occupancy of October 31, 1997 was entered by the trial judge prior to both Jones and Barker filing its motion to intervene in April 1998, as well as the trial court changing the date of valuation to August 13, 1998. But, Appellees told the trial judge that such October 31, 1997 order was "void" because the court lacked jurisdiction:

> "BY MR. OLSON: Yes, but as to my clients, the order of immediate occupancy [referencing the October 31, 1997 order] - - that was void because it lacked jurisdiction. And I believe as to my clients, the statute's very clear that that interest runs from the date of immediate occupancy or the date of possession, and possession is later than immediate occupancy. We don't have an argument that it is earlier."

(R. 1198, p. 35.) Counsel making the statement was representing all Appellees at the time.

After Jones and Barker intervened, the court signed another order of immediate occupancy on April 13, 1999, this order as to all parties. As of that date, Davis County had not taken possession of the property and all of the defendant/landowners Jones, Barker and Kerr were not only represented by the same counsel, their interests in the compensation award were indivisible and non-severable.

The law is clear that an order of immediate occupancy is like the eminent domain complaint, *in rem*, and makes no distinction as to particular interests. Rich, 97 Pac. at 225. If as Jones and Barker/Kerr argue, the October 31, 1997 occupancy order was "void," the date of that void order cannot be the basis for the determination of interest on a judgment based on the changed valuation date of August 13, 1998. State Road Comm. v. Danielson, 247 P.2d 900 (Utah 1952). That is why Davis County takes the position that the October 31, 1997 order was effectively struck or superceded by the March 8, 1999 order of occupancy.

The Appellees want it all ways. On the one hand, they want the switched and later valuation date for purposes of assessing damages to all the defendant/landowners. On the other hand, they want to use the date of a "void" order of occupancy upon which to calculate the prejudgment interest as to all the Defendants on the damage verdict based upon the switched value date.

The Appellees, Jones and Barker/Kerr, are trapped by self-contradiction and inconsistent argument. The trial court bought in to the paradox of argument and calculated prejudgment interest of $298,346.00 from October 31, 1997 to the date of the Judgment, May 4, 2000. (R. at 949-50.) The court prejudicially erred in that determination and should have, in all events, determined interest from the date of the enforceable order of immediate occupancy, March 8, 1999. The dollar difference in the erroneous calculation and the proper calculation of interest is $160,185.00.

As part of the reversal of the Judgment in this case, this Court should also determine that interest should be calculated from the enforceable date of occupancy. However, even if the Judgment of the trial court were affirmed on the other issues raised in this appeal, interest on the Judgment must be calculated from March 8, 1999.

CONCLUSION

The prejudicial error in this case is manifold and pervasive. The judgment on the verdict of the jury must be reversed and set aside and a new trial ordered on the issue of compensation for the condemnation taking, using the statutory valuation date, excluding sales whose prices were enhanced by the public project, and without reference to the collateral source of payment of the verdict.

Respectfully submitted,

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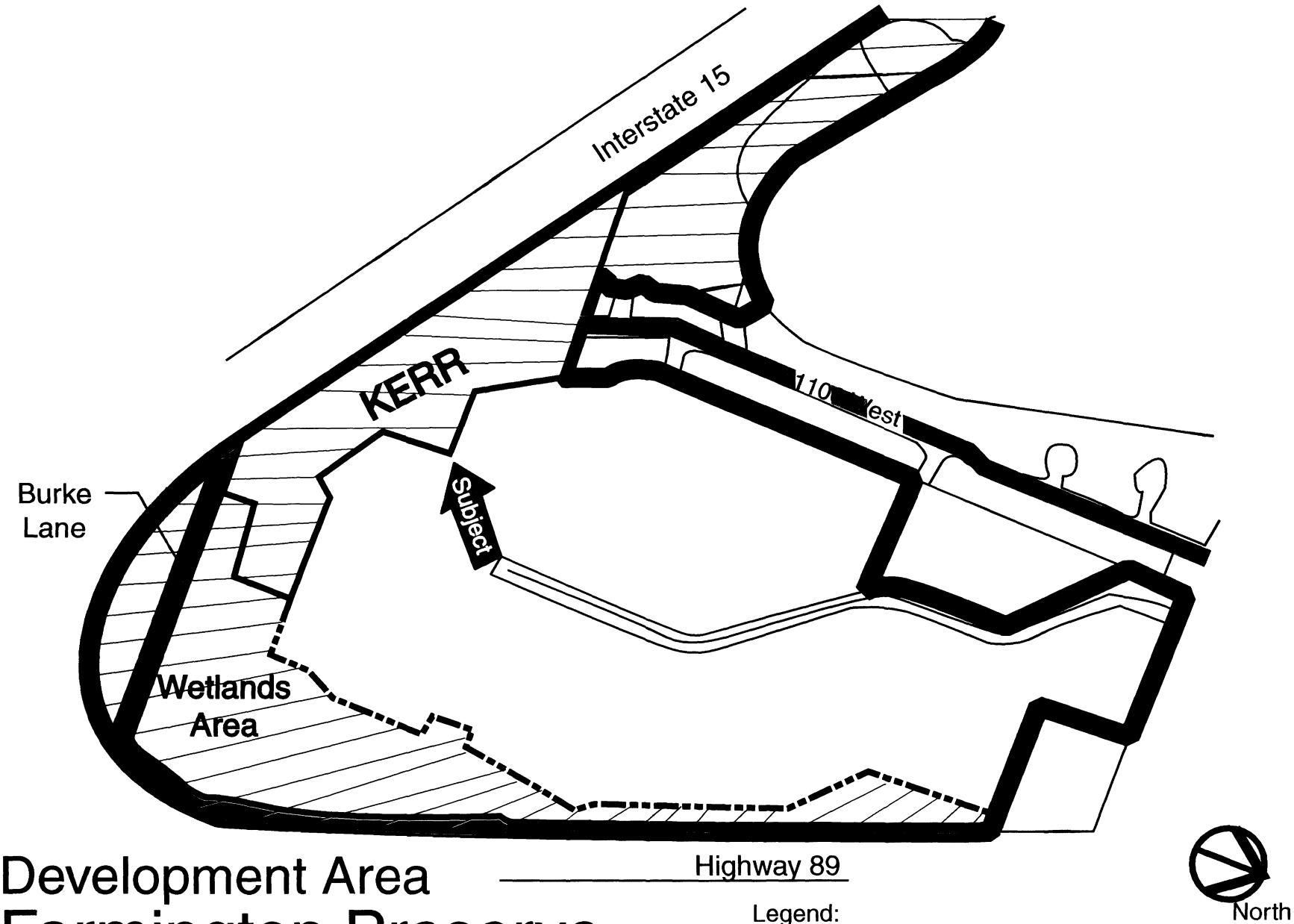
GERALD E. HESS
Davis County Attorney's Office

Dated: October 1, 2001

Attachment 1



Development Area
Farmington Preserve

Legend:

Yellow	Kerr Property
Red	Development Boundary
Green	Burke Lane
Blue	1100 West

For Illustrative Purposes Only